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No. 90-1611

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

LEONARD M. KOIRE,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should, as it has done in *Church of Scientology of California v. Wollersheim*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3628 (1991), *International Soc'y of Krishna Consciousness of California v. George*, 499 U.S. ___, 111 S. Ct. 1299, 59 U.S.L.W. 3629 (1991), and *Pacific Lighting Corp. v. MGW, Inc.*, 499 U.S. ___, 111 S. Ct. 1299, 59 U.S.L.W. 3628 (1991), vacate the punitive damages judgment of the Court of Appeal of California and remand to that court for further consideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 59 U.S.L.W. 4157 (1991).

2. Whether the review of punitive damage jury awards by California trial and appellate courts is so inadequate as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT PURSUANT TO RULE 29.1

Transamerica Occidental Life Insurance Company is a wholly owned subsidiary of Transamerica Insurance Corporation of California which, in turn, is a wholly owned subsidiary of Transamerica Corporation, the ultimate parent company and a publicly traded company. Transamerica Occidental Life Insurance Company has no subsidiaries other than wholly owned subsidiaries.

STATEMENT PURSUANT TO RULE 29.4(c)

Because this petition for writ of certiorari draws into question the constitutionality of California Civil Code section 3294, 28 U.S.C. section 2403(b) may be applicable.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

Petitioner Transamerica Occidental Life Insurance Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal entered in the above-entitled proceeding on October 30, 1990.

OPINION AND ORDERS BELOW

The October 30, 1990 opinion of the California Court of Appeal was ordered "not to be published" by that court. It is reproduced in the appendix hereto (hereinafter cited as "App."), A-32. The January 16, 1991 order of the Supreme Court of California denying Transamerica's petition for review is unreported and reproduced in App., A-70. The Court of Appeal's remittitur, issued on February 25, 1991, is reproduced in App., A-71. The Judgment in this action, entered on April 29, 1988, is unpublished and reproduced in App., A-12.

JURISDICTION

The October 30, 1990 decision of the California Court of Appeal rejected Transamerica's federal constitutional challenge to the $750,000 punitive damage award in this case. The challenge had been raised in the trial court. *See* App., A-1, A-5, A-17. It was renewed in Transamerica's

briefs before the Court of Appeal.[1] See App., A-25, A-29. Finally, it was presented to the California Supreme Court in a petition for review. See App., A-62. On January 16, 1991, the California Supreme Court declined to review the challenge to the jury's punitive award. This petition is filed within ninety days of the denial of the petition for review by the California Supreme Court. The questions presented are within this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

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[1] Because the California Supreme Court has previously rejected constitutional attacks on punitive damages, *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n. 2, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983); *Peterson v. Superior Court*, 31 Cal. 3d 147, 160-161, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 819-820, 598 P.2d 452, 157 Cal. Rptr. 482, *appeal dismissed and cert. denied*, 445 U.S. 912 (1980); *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 66 n. 13, 529 P.2d 608, 118 Cal. Rptr. 184 (1974); *People v. Superior Court (Kaufman)*, 12 Cal. 3d 421, 433, 525 P.2d 716, 115 Cal. Rptr. 812 (1974), under California law it actually was not necessary for Transamerica to raise the issue of the constitutionality of punitive damages in the California Superior Court or Court of Appeal in order to preserve the issue for review by the California Supreme Court. *See Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 292, n. 1, 758 P.2d 58, 250 Cal. Rptr. 116 (1988) ("it was pointless for defendant to ask either the trial or appellate court to overrule one of our decisions").

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

California Civil Code section 3294 and California Code of Civil Procedure section 657 are reproduced in the appendix. App., A-72.

STATEMENT OF THE CASE

This case concerns a dispute between Leonard Koire and Transamerica over a disability insurance policy. After receiving two years worth of policy benefits, Koire asserted he was entitled to further benefits as a result of a recurrent disability. Transamerica responded that Koire had exhausted the benefits to which he was entitled under his policy. Koire commenced this action.

The case went to trial. Prior to the instructions to the jury, Transamerica moved for a directed verdict on the issue of punitive damages, on federal constitutional grounds, and objected to all jury instructions about punitive damages. App., A-1, A-5. The trial court denied Transamerica's motion and overruled its objection. The jury awarded Koire $125,000 on his claim of breach of the implied covenant of good faith and fair dealing in his disability insurance contract. The jury also awarded $750,000 in punitive damages. Judgment was entered on the jury's verdict. App., A-12.

In its post-trial motion for a new trial, Transamerica challenged the jury's award of punitive damages by renewing its constitutional arguments. App., A-17. Without comment, the trial court denied Transamerica's motion for a new trial and Transamerica's motion for

judgment notwithstanding the verdict. App., A-23. Transamerica appealed.

In its opening brief in the California Court of Appeal, Transamerica argued the jury's punitive award was unconstitutional. It contended California's practice of permitting juries to award punitive damages with no guidance concerning the amount or limit of the award was "unconstitutionally vague and a denial of due process." App., A-26.

In affirming the judgment in its October 30, 1990 unpublished opinion, the Court of Appeal addressed the constitutionality of punitive damages on the merits:

> "[Transamerica] also claims on appeal that the punitive damages award is unconstitutional. [Transamerica] argues that because the jury was instructed that the law provides no fixed standard as to the amount of punitive damages, the standard is unconstitutionally vague and a denial of due process. Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402, Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 66, and cases there cited, have rejected these arguments." App., A-58.

Thus, the constitutionality of punitive damages was raised and passed on by the Court of Appeal.

Transamerica filed a petition for review in the California Supreme Court, challenging the jury's $750,000 punitive award on state and federal due process grounds. Specifically, Transamerica asked the court to "decide whether the standards governing juries' awards of punitive damages in California violate the state and federal due process clauses." App., A-67. The California Supreme Court denied review on January 16, 1991 App., A-70.

Transamerica filed with Justice O'Connor, as Circuit Justice for the Ninth Circuit, an application to stay execution and enforcement of the judgment pending this petition. The application was denied the same day this Court issued its opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 59 U.S.L.W. 4157 (1991).[2]

REASONS FOR GRANTING THE WRIT

THE CALIFORNIA STANDARD OF JUDICIAL REVIEW OF PUNITIVE DAMAGE AWARDS NEEDS TO BE EVALUATED IN LIGHT OF THIS COURT'S OPINION IN PACIFIC MUTUAL LIFE INSURANCE COMPANY V. HASLIP.

Acting in three different punitive damage cases from the California Court of Appeal, this Court recently

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[2] After the stay application was denied, Transamerica paid Koire the punitive damages due pursuant to the judgment. (The compensatory portion of the judgment had already been paid since it was not going to be challenged in this Court.) Payment of the judgment under compulsion, as here, does not deprive a party of the right to petition for certiorari. "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money." *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885); *see Bakery Sales Drivers Local Union Number 33 v. Wagshal*, 333 U.S. 437, 442 (1948) (action in "obedience to the judgment" does not make case moot); *Mancusi v. Stubbs*, 408 U.S. 204, 205-207 (1972); *see also* Cal. Code Civ. Proc., § 908 (West 1980) ("When the judgment . . . is reversed . . . , the reviewing court may direct that the parties by returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment . . . ")

granted certiorari, vacated the judgments, and remanded for further consideration in light of the Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 59 U.S.L.W. 4157 (1991).[3] This case is another requiring further analysis of the constitutionality of California's method for awarding punitive damages in civil litigation.

In *Haslip*, this Court found Alabama's system for imposing punitive damages satisfied due process requirements. The California scheme, however, provides substantially less protection from "punitive damages that 'run wild,' " *Haslip*, 111 S. Ct. at 1043. The differences between Alabama and California are particularly apparent when comparing the extent of judicial review those states give to juries' punitive damage awards.

This Court observed the Alabama Supreme Court has "established post-trial procedures for scrutinizing punitive awards" which "ensure[] meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," *Haslip*, 111 S. Ct. at 1044, and itself "provides an additional check on the jury's or trial court's

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[3] The three California cases are *Church of Scientology of California v. Wollersheim*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3628 (1991); *International Soc'y of Krishna Consciousness of California v. George*, 499 U.S. ___, 111 S. Ct. 1299, 59 U.S.L.W. 3629 (1991); *Pacific Lighting Corp. v. MGW, Inc.*, 499 U.S. ___, 111 S. Ct. 1299, 59 U.S.L.W. 3628 (1991). This Court also made the same order in four cases from other jurisdictions. *Reserve Life Ins. Co. v. Eichenseer*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3628 (1991) (remanded to Fifth Circuit); *Hospital Auth. v. Jones*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3628 (1991) (remanded to Georgia Supreme Court); *Clayton Brokerage Co. v. Jordan*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3629 (1991) (remanded to Eighth Circuit); *Portec, Inc. v. The Post Office*, 499 U.S. ___, 111 S. Ct. 1298, 59 U.S.L.W. 3629 (1991) (remanded to Tenth Circuit).

discretion" by "undertak[ing] a comparative analysis . . . [and] appl[ying] the detailed substantive standards it has developed for evaluating punitive awards," *id.*, at 1045. California does not have these safeguards. Instead, the trial and appellate courts peruse punitive damage awards under a standard of review that is highly deferential to the jury's decision.

California trial courts are statutorily proscribed from granting a new trial on grounds of insufficiency of the evidence or excessive damages "unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the *. . . jury clearly should have reached a different verdict. . . .*" Cal. Code Civ. Proc., § 657 (West 1976) (emphasis added). Further, while an Alabama trial court must make a record of its reasons for not changing a jury's award so as to assure that a meaningful review of a punitive award has occurred, *Haslip*, 111 S. Ct. at 1044, there is no such requirement in California. The trial court here was completely silent as to its reasons for upholding the jury's punitive award.

Review in California's appellate courts is even less substantial than in the trial court. As California's high court has instructed, "an appellate court may reverse an award of punitive damages only when the entire record, when *viewed most favorably to the judgment*, indicates that the judgment was rendered as a result of *passion and prejudice.*" *Nevada Nat'l Leasing Co. v. Hereford*, 36 Cal. 3d 146, 153, 680 P.2d 1077, 203 Cal. Rptr. 118 (1984) (emphasis added); *see also Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 398, 402, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982); *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 922-923,

927-928, 582 P.2d 980, 148 Cal. Rptr. 389 (1978); *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 118 Cal. Rptr. 184 (1974).

This Court found Alabama's standard of appellate review distinguishable "from the Vermont and Mississippi schemes about which Justices expressed concern in [prior opinions of this Court]." *Haslip*, 111 S. Ct at 1045 n. 10. The Mississippi standard of review, as reported by this Court, is the same as the California standard. *Id.* California appellate courts do not fulfill their role in satisfying the constitutional requirement that a determination be made "whether a particular award is greater than reasonably necessary to punish and deter." *Id.*, at p. 1046.

Finally, this Court noted that because of Alabama's meaningful judicial review of jury punitive awards, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045. In California, on the other hand, the rule is that "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero*, 13 Cal. 3d, at 65.

Alabama's trial and appellate courts engage in sufficiently meaningful review of jury punitive awards to satisfy due process concerns. Whether California's substantially lesser standards of judicial review also pass constitutional muster is an unsettled question that should be addressed by this Court or by the California courts under the guidance of *Haslip*.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

LEONARD M. KOIRE, Plaintiff, v. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA and DOES 1 through 25, Inclusive, Defendants.	CASE NO. C 493474 DEFENDANT TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF PUNITIVE DAMAGES AND OBJECTIONS TO ALL PUNITIVE DAMAGE INSTRUCTIONS FILED APR 25 1988

I

INTRODUCTION

Punitive damages are authorized by courts and awarded by juries to serve the governmental function of punishing conduct perceived as antisocial in order to achieve the twin goals of retribution and deterrence. Because they are extra-compensatory and serve state

functions, punitive damages constitute state action subject to federal constitutional guarantees against arbitrary governmental conduct and excessive punishments.

The California legislature has authorized punitive damages but has set no limit on the amount of the penalty which may be imposed in cases involving common law or statutory "bad faith". Subjecting defendants to punitive, unlimited fines is arbitrary, capricious and inconsistent with constitutional restrictions embodied in the Due Process Clause of the Eighth [sic] Amendment.

II

SECTION 3294 OF THE CALIFORNIA CODE IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT FAILS TO LIMIT THE MAXIMUM SIZE OF THE PUNITIVE DAMAGES AWARD

The judicial imposition of punitive fines, including punitive damages, is subject to traditional standards of due process. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court struck down, under the Due Process Clause of the Fourteenth Amendment, a state statute under which a jury was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be. . . . " *Id.* at 403.

The heart of the Supreme Court's Due Process Clause analysis in *Giaccio* is that statutes cannot constitutionally leave to a jury the unfettered power to impose financial

burdens, whether civil or criminal, in an arbitrary fashion.[1]

Section 3294 of the California Code allows a plaintiff to recover unlimited punitive damages. Cal. Civ. Code § 3294 (Deering 1988). In the case at bar, Section 3294 of the California Code violates the Due Process Clause of the Fourteenth Amendment precisely because of the lack of any pre-established limit on the imposition of punitive damages. A carefully instructed, narrowly circumscribed jury may be constitutionally capable of determining the appropriate level of punishment necessary in a particular case to achieve society's goals of retribution and deterrence. The jury, however, is constitutionally incapable of

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[1] Recently, the Court has recognized the importance of such a Due Process analysis in the context of punitive damages. The Supreme Court in *Aetha* [sic] *Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), declared that the argument that the "lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause . . . raise[s] [an] important issue [ ] which . . . must be resolved. . . . " The question of whether the subjection of defendants to unlimited monetary punishment violates the Due Process Clause is currently before the Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-765 (1987).

performing that function absent legislatively determined limits.

DATED: April 29, 1988

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APPEARANCES: (See title page.)

MONDAY, 04-25-88 # 09:00 A.M.

HON. ARTHUR BALDONADO, JUDGE

(The following proceedings were held in open court out of the presence of the jury:)

THE COURT: On the record outside the presence of the jury in KOIRE v. OCCIDENTAL, both counsel are present, Mr. Koire.

Mr. Patrick, would you like to address your motion for directed verdict on the issue of punitive damages and objections to all punitive damages now?

MR. PATRICK: That would be fine, your Honor.

THE COURT: Go ahead.

MR. PATRICK: The written motion that I filed sets forth only the constitutional arguments and is designed primarily for preserving those arguments on appeal in the event that the jury should enter an award of punitive damages against the defendant.

I provided counsel with a copy of that last week.

More importantly, your Honor, the motion is not addressed specifically in terms of the constitutional issues, but goes to the factual matter, that is the defendants knew that the question of punitive damages shouldn't even go to the jury in this matter. There has been no prima facie showing of malice, fraud or oppression, let alone clear and convincing evidence.

It seems to me if this new statute means anything, adding the word "despicable conduct" now requiring proof by clear and convincing evidence, it means that the court has an obligation to address whether that issue should even be presented to the jury.

Despicable conduct, as we discussed on Friday and looked at the BAJI instruction, is defined as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary, decent people.

All we have here, your Honor, is Mr. Koire's claim for the 1982 injury was denied.

The court's previously ruled that the '80 claim and the '84 claim are outside the Statute of Limitations for purposes of punitive damages, so we're only talking about that one claim.

All we have is that his claim was denied.

The testimony reflects that it was denied because Dr. Levine indicated that it was a recurrence of the old claim. The claim was investigated on that basis, and based upon the prior information which Mr. Koire himself had provided then confirmed in June of that year, the determination was that he had not resumed his occupation.

So it seems to me that there is simply not sufficient evidence to have that issue go to the jury.

Now under normal circumstances, I know the court would always want these kinds of issues to go to the jury, but I think this case has some peculiar aspects

which might require a determination to be made at this point.

One, we do have these two basic incidents, the '80 and the '84, that are outside the period for punitive damages, and I think there is certainly the possibility of confusion in the jury's mind and we might end up with a verdict that, in fact, was based upon either of those two claims.

We already have what appears to be a fairly complicated set of special verdicts, and it seems to me we can simplify things greatly if we simply don't have that issue go before them where there really is no evidence, no sufficient evidence, let alone clear and convincing evidence, that this defendant acted despicably in denying Mr. Koire's claim.

THE COURT: Okay. And that motion is addressed to this phase of the case?

MR. PATRICK: That is correct, your Honor. It seems to me that they shouldn't even be asked the question of whether or not they find.

If you look at counsel's suggested Question 6 on the Special Verdict Form, "If your answer to Question 1 – " which had to do with the breach of the covenant " – is 'Yes', do you find defendant was guilty of oppression, fraud or malice in its breach of the covenant?"; now my understanding of 3295 is if they answer the question "Yes", then the only thing that remains to be determined in the final phase is the amount of punitive damages.

This question, if they answer that "Yes", they are saying, "We will award punitive damages"; it's only a

question of the amount. And under these circumstances, it seems to me this wouldn't even have met the test under the old statute let alone the new statute, clear and convincing evidence. And we now have the additional phrase "despicable conduct." I just don't see any evidence of despicable conduct.

The evidence is that the claim was denied. That's undisputable; but where is the evidence of vile, base, contemptible, miserable, wretched, loathsome, looked down upon and despised by ordinary, decent people?

There is considerable evidence in the record about what the defendant did, what it based its determination on, mostly information provided by Mr. Koire.

And the linchpin of the recurrent disabilities was Dr. Levine himself had who answered the original questionnaire that was sent to him after the claim was submitted saying, "Since your diagnosis is the same as you've given us in the past, is this a recurrence or is this something new?" And he says it's a recurrence; and on that basis they treated it as a recurrence.

THE COURT: All right. Thank you, Mr. Patrick.

MR. PATRICK: Thank you.

THE COURT: Mr. Blanck.

MR. BLANCK: Thank you, your Honor.

Despicable conduct, contemptible conduct, base conduct, it's all relative to the position of this defendant that goes not to just one act that breached the covenant of good faith and fair dealing, it goes to at least eight different acts that they committed.

They unreasonably withheld payments of the policy; they failed to investigate the possible basis that might support Koire's claim; clearly Mrs. Taylor testified they gave no consideration at all to partial disability, and that's such a clear-cut requirement in the policy, it needs no further explanation; they denied Koire's claim on requirements they knew were impermissible. And how did they know they were impermissible? Because they knew the definition of total disability was not each and every duty, but it's the state law he must be unable to perform substantially all of his material duties.

Yet when they rejected his claim on July 12, they used a requirement that's nonexistent.

They said, "Well, he has to resume full work duties and he failed to do that."

Now the only way you can arrive at that little phraseology is if you look at their definition of the policy. If they're using that definition, he didn't resume each and every duty, that's true, therefore the rejection is based on that very definition, it's not based on what the policy requires, a further basis.

They practically conceded that he returned to work on a full-time basis.

They delayed paying him. They unreasonably delayed paying him, and we have evidence of that from Mr. Zoikewitz.

They interpreted the records in every way possible to reject the claim. They didn't consider how to pay the claim at all. From Day 1 their whole objective was to reject the claim.

They go back to 1977. Stale information. And they say, "Well, we're relying on Dr. Levine."

How are they relying on Dr. Levine?

When Dr. Levine in 1979 sent them a statement which said, "Mr. Koire's returning to work on September 1st, 1979," well, they don't even pay attention to that because, hey, they would have to pay money.

But when Dr. Levine sends them some incomplete statements which again they failed to meet their obligations of telling him what his critical duties were, they just said, "Oh, that's the gospel"; but when he says something to them that they don't like when they are going to have to pay some money, they ignore it totally.

I think their total conduct – and I'm not talking about one incident but everything they've done throughout the rejection of his claims – clearly shows the contemptible behavior. And especially when you look at them as a fiduciary.

There's this giant corporation who's accepted his money for 22 years and won't pay him his claims. They could very easily have done it.

The custom and practice in the industry under these circumstances, as testified to by Mr. Zolkewitz, says that they should have paid him.

They were wrong. Not mistaken, just dead wrong.

On the punitive damage aspect, I think there is more than sufficient evidence for it to go to the jury.

THE COURT: All right. The motion will be denied.

The issue will be submitted to the jury on the basis of this record. There is sufficient evidence for to go to the jury.

The remaining issue, gentlemen, is the instructions pertaining to plaintiff's claim of ambiguity in the policy. And I've reviewed both sets of instructions, those proposed by defense and those proposed by plaintiff. And as a tentative ruling, I will give both sets of instructions on that issue.

If you wish to be heard on the record, go ahead.

MR. PATRICK: Yes, your Honor. I had objected to the giving of any of the ambiguity instructions on two

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FILED
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KOIRE, LEONARD M. PLAINTIFF(S) VS OCCIDENTAL LIFE INSURANCE COMPANY, ET AL., DEFENDANT(S)	CASE NUMBER C 493 474 JUDGMENT ON VERDICT IN OPEN COURT

This action came on regularly for trial on APRIL 14, 1988; in Department 40 of the Superior Court, the Honorable ARTHUR BALDONADO Judge Presiding; the plaintiff(s) appearing by attorney(s) BLANCK & BLANCK

BY: Herbert Blanck

and the defendant(s) appearing by attorney(s) GIBSON, DUNN & CRUTCHER BY: Kirk A. Patrick

A jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiff(s) and the defendant(s) were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to

consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

TITLE OF COURT AND CAUSE "We, the jury in the above entitled action, find in favor of the plaintiff, LEONARD J. KOIRE, and, against the defendant Transamerica Occidental Life Insurance Company.

Answer "yes" or "no".

Answer: Yes .

If your [sic] is yes, proceed to question No. 1.

If your answer is no, sign and return this Verdict.

Question No. 1: Did the defendant breach the covenant of good faith and fair dealing when it refused to pay plaintiff, Leonard M. Koire, benefits under his disability insurance policy arising from his fall at his place of business on December 29, 1982?

Answer "yes" or "no".

Answer: Yes .

If your answer is yes, proceed to question No. 2 and then to question No. 7, but do not answer questions no. (illegible).

If your answer is no, proceed to question No. 3 and then question No. 5.

Question No. 2: What amount of compensatory damages do you award to the plaintiff, Leonard M. Koire?

Answer: The sum of $ 125,000.00 .

Proceed to question No. 3.

Question No. 3: Did the defendant breach the disability insurance contract when it failed to pay plaintiff, Leonard M. Koire, the disability benefits under his insurance policy for his disability resulting from his left lung cancer surgery that occurred on April 14, 1980?

Answer "yes" or "no".

Answer: No .

If your answer is yes, proceed to question No. 4.

If your answer is no, proceed to question No. 5.

Question No. 4: What amount of damages do you award to the plaintiff, Leonard M. Koire, for the breach of the contract of insurance?

Answer: The sum of $ _____.

Question No. 5: Did the defendant breach the disability insurance contract when it failed to pay Leonard M. Koire disability benefits under the policy for his disability resulting from his right lung cancer surgery on June 18, 1984?

Answer "yes" or "no".

Answer: No .

If your answer is yes, proceed to question No. 6.

If your answer is no, proceed to question No. 7, if your answer to question No. 1 was yes.

Question No. 6: What amount of damages do you award to the plaintiff, Leonard M. Koire, for the breach of the contract of insurance?

Answer: The sum of $ _____.

If you answered questions 5 & 6 do not answer question no. (illegible)

Question No. 7: Do you find that defendant was guilty of malice, oppression or fraud in its breach of the covenant of good faith and fair dealing?

Answer "yes" or "no".

Answer: Yes .

Dated: 4-27-88

/s/ Joe G. Pinuelas
FOREPERSON OF THE JURY

TITLE OF COURT AND CAUSE

We, the jury in the above entitled action, assess punitive damages against the defendant, Transamerica Occidental Life Insurance Company as follows:

The sum of $ 750,000 .

Dated: April 29, 1988

Joe G. Pinuelas.
FOREPERSON OF THE JURY

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said Plaintiff, LEONARD M. KOIRE, have and recover from said Defendant, TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, the sum of $125,000.00 in compensatory damages and $750,000.00 in punitive damages, with interest thereon at the rate of ten percent per annum from the date of the verdicts until paid together with costs and disbursements amounting to the sum of $ _____.

GIBSON, DUNN & CRUTCHER
KIRK A. PATRICK
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(213) 552-8500

Attorneys for Defendant
Transamerica Occidental
Life Insurance Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LEONARD M. KOIRE, Plaintiff, v. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA and DOES 1 through 25, Inclusive, Defendants.	CASE NO. C 493474 Date: June 23, 1988 Time: 9:30 Dept: 40 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL [Notice of Intention To Move for New Trial Previously Filed] FILED MAY 26 1988

* * *

IV

THE PUNITIVE DAMAGE AWARD IS AGAINST LAW BECAUSE IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT [C.C.P. 657(6)]

A. Section 3294 Of The California Code Is Unconstitutional On Its Face Because It Fails To Limit The Maximum Size Of The Punitive Damage Award

The judicial imposition of punitive fines, including punitive damages, is subject to traditional standards of due process. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court struck down, under the Due Process Clause of the Fourteenth Amendment, a state statute under which a jury was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be . . . . " *Id.*, at 402. The heart of the Supreme Court's Due Process Clause analysis in *Giaccio* is that statutes cannot constitutionally leave to a jury the unfettered power to impose financial burdens, whether civil or criminal, in an arbitrary fashion. The Due Process analysis of the Supreme Court which struck down a $230 penalty in *Giaccio* would apply with even greater force to the $750,000.00 penalty in this case.[1]

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[1] Recently, the Court has recognized the importance of such a Due Process analysis in the context of punitive damages. The Supreme Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), declared that the argument that the

(Continued on following page)

Section 3294 of the California Code allows a plaintiff to recover unlimited punitive damages in addition to the recovery of actual damages. Cal. Civ. Code § 3294 (Deering 1988). In the case at bar, Section 3294 of the California Code violates the Due Process Clause of the Fourteenth Amendment precisely because of the lack of any pre-established limit on the imposition of punitive damages. A carefully instructed, narrowly circumscribed jury may be constitutionally capable of determining the appropriate level of punishment necessary in a particular case to achieve society's goals of retribution and deterrence. The jury, however, is constitutionally incapable of performing that function absent legislatively determined limits.

B. The $750,000 Punitive Award Imposed By The Jury In This Case Violates The Excessive Fines Clause

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor

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(Continued from previous page)

"lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause . . . raise[s] [an] important issue [ ] which . . . must be resolved . . . . " The Supreme Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (decided May 16, 1988), recently declined, on procedural grounds, to decide the issues of the constitutionality of punitive damges [sic] under the Due Process Clause and Excessive Fines Clause. In her concurring opinion therein, Justice O'Connor observed: "Appellant has touched on a due process issue that I think is worthy of this Court's attention in an appropriate case . . . . In my view, because of the punitive character of [punitive damage] awards, there is reason to think that this may violate the Due Process Clause." *Crenshaw*, Slip Opinion at page 2 of Justice O'Connor's concurring opinion.

cruel and unusual punishments inflicted." In holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment was generally applicable only in punitive contexts, the Supreme Court nonetheless recognized in *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) that:

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.

Id., at 669, n.37. As this observation in *Ingraham* suggests, the plain language of the Excessive Fines Clause could reasonably be interpreted to be fully applicable to any punitive "fine" imposed in any civil or criminal proceeding.

The centuries of English legal history and practice inherited by the Framers establish that they would have understood modern-day punitive damage awards as being within the prohibition of the Excessive Fines Clause. The Supreme Court in *Solem v. Helm*, 463 U.S. 277 (1983), made clear that the substantive content of each of the clauses of the Eighth Amendment was to be derived, in part, from each of their counterparts in the English Bill of Rights in 1689. The *Solem* court held that the principle of proportionality first articulated in the Amercements Clauses of Magna Carta and later repeated in the English Bill of Rights of 1689 was to be regarded as having been carried over into the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Id.* The same is obviously true of the Excessive Fines Clause of the Eighth Amendment because the word "excessive" on its face manifestly connotes proportionality.

The concept of proportionality embodied in Chapter 20 of Magna Carta was understood over the centuries as describing a relationship between the amercement and the wrong done to society. Punitive damage awards today are imposed for the same retributive and deterrent purposes as amencements [sic] under Magna Carta. *See Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910, 928 n.13, 583 P.2d 980, 148 Cal. Rptr. 389 (1978).

Punitive damages, like amercements, are also imposed in the same manner as criminal fines. Because they are penal in nature, punitive damages have been characterized by the court as "private fines levied by civil juries." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Indeed, as Justice Marshall observed in dissent in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971), punitive damages "serve the same function as criminal penalties and are in effect private fines."

Without a statute or court rule that sets forth a ceiling for imposing punitive damages, the imposition of such damages violates the Excessive Fines Clause as well as the Due Process Clause.

The California legislature has established a limit on fines imposed on defendants who criminally conspire to cheat and defraud any person of property. Cal. Penal Code § 182(4) (Deering 1985). Under this statute, a defendant may not be punished by a fine of more than ten thousand dollars. *Id.*

The conduct proscribed in Section 182 is not identical to defendant's purported conduct in the case at bar. The limitation on the imposition of of [sic] fines in criinal [sic] conspiracy cases, however, can serve as an appropriate

benchmark under which a proper and objective limit may constitutionally be imposed in this case. Further, in order for such a criminal fine to be imposed, a unanimous verdict would be required and the applicable burden of proof would be higher – beyond a reasonable doubt. Unless this penal statute serves as the outer limit for fines imposed in less flagrant cases, the legal system would be perpetuating the irony that only the more culpable offenders will be punished in a manner proportionate to the offense, *see Ingraham v. Wright*, 430 U.S. 651 (1977) (White, J., dissenting), while less flagrant offenders would be subject to arbitrary and disproportionate penalties. Consequently, the $750,000 fine imposed in this case is disproportionate to the offense and should be adjusted accordingly.

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

JUNE 23, 1988
HONORABLE ARTHUR BALDONADO — JUDGE
Deputy Sheriff
M. MORENO — Court Attendant

J. L. RENDON — Deputy Clerk
E. LESTRO — Reporter
(Parties and counsel checked if present)

C 493 474

LEONARD M. KOIRE
VS
OCCIDENTAL LIFE INSURANCE
COMPANY ETC., ET AL.,

Counsel for Plaintiff
BLANCK & BLANCK
By: Herbert F. Blanck

Counsel for Defendant
GIBSON, DUNN & CRUTCHER
BY: Kirk A. Patrick

NATURE OF PROCEEDINGS: PLAINTIFF'S MOTION FOR NEW TRIAL; JNOV AND MOTION TO TAX COSTS

Motions come on for hearing.

Motion for new trial is argued.

The other motions are taken under submission on the pleadings.

LATER:

Court makes the following rulings:

The motion for new trial is denied.

The motion for Judgment Not withstanding the Verdict is denied.

Defendant's motion to tax costs is granted in part. Item # 9 is partially taxed in the sum of $28,000. Yielding the sum of $26,000.00, resulting in Total Costs of $30,265.54.

A copy of this minute order is sent to counsel of record via U.S. Mail this date.

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MINUTES ENTERED
DEPT. 40 6-23-88
COUNTY CLERK

B036342

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

LEONARD M. KOIRE,

Plaintiff and Respondent,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Defendant and Appellant.

Appeal from the Superior Court for Los Angeles County
Arthur Baldonado, Judge

APPELLANT'S OPENING BRIEF

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TRANSAMERICA OCCIDENTAL
LIFE INSURANCE COMPANY

* * *

B. The Punitive Damages Award Is Unconstitutional.

The jurors were instructed, according to BAJI No. 14.71, that "[t]he law provides no fixed standard as to the amount of . . . punitive damages" they could award. (A.A. p. 144.) This non-standard standard is unconstitutionally vague and a denial of due process. Also, the absence of a legislatively-prescribed maximum limit makes any punitive damages award under Civil Code section 3294 an excessive fine in violation of article I, section 17 of the California Constitution.

Transamerica raised these very objections below (A.A. pp. 140, 303) and we reiterate them here to preserve them for appeal to the California and United States Supreme Courts, recognizing this court may feel bound by the California Supreme Court's cursory dismissals of constitutional challenges in the past. (See, e.g., *Hasson v. Ford Motor Co.*, (1982) 32 Cal.3d 388, 402, fn. 2.) It is nonetheless worth noting that the California Supreme Court has not addressed the constitutional questions after a majority of justices of the United States Supreme Court indicated a serious inclination to declare punitive damages awards unconstitutional on federal due process grounds when returned under standardless statutes such as section 3294.

The United States Supreme Court has expressly left for "another day" the question "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." (*Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989) 492 U.S. ___, ___ [106 L.Ed.2d 219, 239, 109 S.Ct. 2909].) But,

five or six of the current justices are already on record as likely to answer the question in the affirmative.

For example, Justice Brennan, joined by Justice Marshall, stated (*Browning-Ferris, supra,* 106 L.Ed.2d at pp. 241-242 (Brennan, J., concurring)):

> "Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' [citation], or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,' [citation]. [Citations.] I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits."

Similarly, Justice O'Connor, joined by Justice Stevens, stated her "adhere[nce] to my comments in *Bankers Life & Casualty Co. v. Crenshaw,* [(1988) 486 U.S. 71, 86-89 [100 L.Ed. 2d 62, 77-79, 108 S.Ct. 1645]] (opinion concurring in part), regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." (*Browning-Ferris, supra,* 106 L.Ed.2d at p. 243 (O'Connor, J., concurring and dissenting).) In *Bankers Life,* Justice O'Connor, that time joined by Justice Scalia, stated (100 L.Ed.2d at p. 78):

> "Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process

> clause. . . . [¶] . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

Finally, then-Associate Justice Rehnquist discussed in detail "the numerous persuasive criticisms that have been leveled against the doctrine" of punitive damages. (*Smith v. Wade* (1983) 461 U.S. 30, 57-60, 87 [75 L.Ed.2d 632, 652-653, 670, 103 S.Ct. 1625] (Rehnquist, J., dissenting).) Included in his anthology was a quotation from the New Hampshire Supreme Court calling punitive damages " 'a monstrous heresy' " and " 'an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law.' " (*Id.*, 75 L.Ed.2d at p. 653.)

B036342

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

LEONARD M. KOIRE,

Plaintiff and Respondent,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Defendant and Appellant.

Appeal from the Superior Court for
Los Angeles County
Arthur Baldonado, Judge

APPELLANT'S REPLY BRIEF

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* * *

V.

THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

To preserve our objections for possible future review, we argued the punitive damages award is an unconstitutional denial of due process and also violates the state constitutional prohibition against excessive fines.[6] We understand that, in absence of a decision from the California or United States Supreme Court supporting our position, this court will not look favorably on these claims. (*Farajpour v. The University of Southern California, supra,* ___ Cal.App.3d at p. ___ [typed opn., pp. 28-31].) We note, however, that since our opening brief was filed, the United States Supreme Court has granted certiorari in a case to be decided next term (*Pacific Mutual Life Insurance Company v. Haslip,* cert. granted April 2, 1990, ___ U.S. ___ [108 L.Ed.2d 782, 110 S.Ct. 1780] (Dock. No. 89-1279)) raising the federal due process questions.

In addition to relying on stare decisis, Koire argues Transamerica raised its constitutional objections too late. He is wrong. First, none of the cases he cites, nor any we

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[6] Koire erroneously states we "make[] no argument premised on the federal constitution." (R.B. p. 23.) Actually, that is our primary position, as evidenced by our extensive quotations from various opinions of United States Supreme Court justices concerning the *federal* due process problems with punitive damages. (A.O.B. pp. 39-41.) As we stated, "a majority of justices of the United States Supreme Court [have] indicated a serious inclination to declare punitive damages awards unconstitutional on *federal* due process grounds when returned under standardless statutes such as section 3294." (A.O.B. pp. 39-40, emphasis added.)

have found, indicate that raising constitutional objections to punitive damages in motions for directed verdict and for new trial is untimely. Second, " ' . . . a constitutional question may be raised at any time if the matter appears on the face of the record. . . . ' " (*Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 82.) Third, if, as Koire asserts and this court has held, our arguments are contrary to binding California Supreme Court authority, then we apparently need not even raise the issue here but could do so in the Supreme Court in the first instance. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra,* 46 Cal.3d at p. 292, fn. 1.)

* * *

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEONARD M. KOIRE, Plaintiff and Respondent, v. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, Defendant and Appellant.	B036342 (Super.Ct. No.C493474) FILED OCT 30 1990

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Baldonado, Judge. Affirmed.

Gibson, Dunn & Crutcher, Kirk A. Patrick, Horvitz & Levy, Ellis J. Horvitz and David S. Ettinger for Defendant and Appellant.

Lascher & Lascher and Edward L. Lascher for Plaintiff and Respondent.

INTRODUCTION

Following a judgment for plaintiff in a suit for breach of contract, breach of covenant of good faith and fair dealing, and other causes of action arising from defendant insurer's denial of disability insurance policy benefits, defendant raises several claims of instructional error, objects to the constitutionality of punitive damages, and challenges the trial court's award of attorneys fees. We find no merit in the issues raised on appeal, and affirm.

On April 6, 1984, plaintiff Leonard M. Koire filed a complaint for breach of contract, fraud, violation of Insurance Code section 790.03, and for negligent infliction of emotional distress against Occidental Life Insurance Company of California ("Occidental") and 25 unnamed defendants. The dispute arose from Occidental's issuance of a Disability Income Policy to Koire and its rejection of Koire's claim of disability, which rejection the complaint alleged breached contract provisions to pay lifetime benefits to him.

A first amended complaint filed June 9, 1987, added a fifth cause of action for breach of the implied covenant of good faith and fair dealing.

The matter was called for trial on April 14, 1988, before Superior Court Judge Arthur Baldonado. On April 25, 1988, the trial court denied Occidental's motion for a directed verdict on the issue of punitive damages and objections to punitive damages instructions.

On April 28, 1988, the jury's general verdict with special findings was filed. The general verdict found in favor of plaintiff Koire and against defendant Occidental. Finding that Occidental breached the covenant of good faith and fair dealing when it refused to pay Koire benefits under his disability policy arising from his fall at his place of business on December 29, 1982, the jury awarded Koire $125,000 compensatory damages. The jury found that Occidental did not breach the disability insurance contract by failing to pay Koire benefits either for a disability resulting from his left lung cancer surgery on April 14, 1980, or for his disability resulting from his right lung cancer surgery on June 18, 1984. The jury

found that Occidental was guilty of malice, oppression, or fraud in its breach of the covenant of good faith and fair dealing.

After further deliberations, on April 29, 1988, the jury assessed $750,000 punitive damages against Occidental. A notice of entry of judgment was filed May 3, 1988.

On June 23, 1988, the trial court denied Occidental's motions for a new trial and for a judgment notwithstanding the verdict, but granted in part Occidental's motion to tax costs.

Occidental filed a notice of appeal July 22, 1988.

STANDARD OF REVIEW

This court views factual matters most favorably to the prevailing party and resolves conflicts in the evidence in favor of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.)

FACTS

A CHRONOLOGY

On November 25, 1966, Leonard Koire applied to Occidental for disability insurance. Occidental produced an investigation report dated December 7, 1966, Plaintiff's Exhibit 2. It described Koire as owner-operator of Regal Liquor & Sundries, providing daily management assisted by a female relative and some clerks.

In 1977 Koire developed problems in his hands and arms caused by ulnar nerve impairment, median nerve entrapment, and Dupuytren's contractures. These nerve

diseases caused a toothache-type pain, swelling, and loss of feeling in both hands. He had 10 surgeries, the last of which occurred May 1, 1981, to try to repair the condition. After six months of recuperation, Koire felt like "a different man." His swelling was gone, redness and pain had diminished, and he no longer had to take heavy medication. He did not, however, have full, normal use of his hands and arms.

On August 31, 1979, Koire decided to return to work, after not performing his duties of owning and managing the store for about two years, during which an uncle helped run the business. When he went back to work, he notified Occidental, which did not question him about the fact that his hands and arms were not better, but stopped paying him benefits. Koire's surgeon, Dr. Stark, however, told him to stop working at the end of February or the first of March, 1980. When he stopped work and had further surgery, he again applied for benefits. Occidental responded by sending $720 and telling him he was paid in full.

In March 1980, after a chest x-ray just before hand surgery, Koire learned that he had lung cancer. Half his left lung was removed.

In July 1981, Koire married Linda Koire. In June 1982, his business was failing and his wife was seven months pregnant, so Koire returned to work on June 15, 1982, on a day-to-day basis, not knowing how long he would be able to work. He worked 10 to 12 hours per day, six and sometimes seven days a week, with six or seven employees working for him.

On December 29, 1982, Koire fell down in the store when his sock caught on a warehouse ramp. He hit his rib cage as he fell and landed on his hands. A UCLA neurologist who examined him told him the fall exacerbated the problem in his arms and that he needed surgery on his legs. Koire refused any further surgery. The accident forced him to stop working, and he submitted a claim for disability benefits based on his Occidental policy.

On July 12, 1983, by letter Occidental denied Koire's claim (Exh. 6). Occidental's letter stated that it had paid "the two year maximum sickness benefit for [Koire's] disability due to osteoarthritis, carpal tunnel syndrome, Dupuytren's Contracture, ulnar and median nerve entrapment syndromes" through April 21, 1980. Occidental's letter stated that it rejected Koire's claim because to qualify for a recurrence of disability, he had to have been able and to have resumed full work duties for at least six months. The letter stated that even though he may have been at his place of employment, it nonetheless appeared that Koire had never resumed the full duties of his occupation after April 21, 1980. Occidental found that Koire did not qualify under the policy's recurrence of total disability provisions as having resumed full time work duties over six months. Occidental's July 21, 1983, letter reiterated this reason for denying benefits.

In 1984 Koire had surgery for cancer in his right lung which reduced him to being an invalid on oxygen.

Since his fall, Koire's wife has been running the business.

THE POLICY

The policy defines "recurrent disability" as follows: "A recurrence of disability from the same cause shall be considered a continuation of the same disability, except that no monthly income shall be paid for any interval between periods of disability. However, a recurrence of total disability commencing after the Insured has resumed his occupation on a full time basis for a continuous period of six months shall be considered a new total disability."

The insurance policy speaks about the resumption of an insured's occupation on a "full time basis," but not about resumption of full work duties. An Occidental Life claims manual, used by Occidental employees in processing claims, defines total disability as "the inability due to injury or sickness or perform substantially all the material duties of his occupation." The policy definition differs from the claims manual definition. The policy manual interprets this language as follows: "If the claimant's medical disability has resulted in physical or mental impairment which prevents him from performing substantially all the critical duties of his occupation or any occupation, whichever is applicable, the claimant has received the definition of being totally disabled."

The policy defines "partial disability" as "the inability of the Insured to perform some, but not all, of the important daily duties pertaining to his occupation." The policy's "Benefit 2" provides a benefit of one half of monthly income for partial disability from injury.

Lawrence Zolkewitz, licensed by the State of California, responsible for servicing about 400 disability claims

per month, employed at Ticor Title Insurance Company as a group plan administrator, and having over 26 years of experience in the insurance business, testified as an expert witness. Zolkewitz felt Koire met the requirements of the recurrent disability clauses by assuming full-time work for six months. Since the accident was the proximate cause of Koire's disability, he should have qualified as [sic] a new period of disability and for lifetime benefits. Zolkewitz also formed the opinion that Occidental's July 12, 1983, letter misrepresented the facts to Koire by stating that he must be able to resume full work duties for a period of six months when the policy stated that all he had to do was to resume his occupation on a full-time basis. Zolkewitz concluded that Koire's insurance policy definition of total disability does not comply with California law.

Audrey Taylor, an Occidental section manager of the disability section who acted as a supervisor of the health disability section in 1982 and 1983, admitted that the policy provides, under the recurrent provisions, that an insured must resume his occupation on a full-time basis for at least six months, but the policy contains no requirement that he must resume his full work duties.

The Occidental claims manual contains the updated California definition of "total disability," which differs from the policy. Taylor did not recall whether Koire or his physicians were informed of any definition of total disability.

PLAINTIFF'S WORK DUTIES AND DISABILITY, AND OCCIDENTAL'S DETERMINATION OF KOIRE'S CLAIM

Occidental's investigation report, prepared in response to Koire's 1966 application for insurance and dated December 7, 1966, describes him as the owner-operator of Regal Liquor & Sundries and describes his duties as daily store manager, assisted by a female relative and some clerks.

According to Darrell Hays, manager of Occidental's health and disability claims department, Occidental never determined Koire's critical duties just before his December 29, 1982, fall. Koire resumed his duties, but Occidental never considered it as a new job in reviewing his claim. Occidental had a list of Koire's critical duties and the physical demands of his occupation, as presented by Koire himself, before deciding to reject his claim. Exhibit 12, a June 2, 1983, document signed by Koire and Hellmers (an Occidental investigator), does not list Koire's critical duties. It describes what he was able to do before the 1977 claim, what he was able to do from June 15 to December 29, 1982, and his inability to manage or operate the store since December 30, 1982.

Occidental rejected the claim based on facts and information, including Koire's occupation [sic], that related to his 1977 claim. Hays did not check with other companies to confirm Koire's statement in Exhibit 14 that other insurance companies were paying him, and did not instruct his staff to talk to Koire's employees about Koire's 1983 claim. Hays did not look at the insurance policy when he reviewed the claim.

Exhibit 11, a May 29, 1983, document from George King, an investigator, to Audrey Taylor contained statements referring to attachments "not to be displayed to the insured," and that the statement's purpose was "not to be revealed to the insured." Hays testified that Occidental proceeded in this way to find out objective statements and not self-serving ones.

Occidental did not contact anybody to determine the critical duties of a manager of a retail liquor business. Occidental did not ask Koire's employees whether Koire was at work full-time, and Taylor relied on information in the file that seemed to answer the question of how long Koire spent at his store from June 15 to December 29, 1982. After determining Koire's duties immediately before his October 1977 claim, Occidental made no other determination of his duties. Taylor never considered whether Koire's job duties had changed.

Taylor's review of Koire's file indicated that when Occidental received a claim form, the attending physician's statement was not complete. Taylor wrote to Dr. Levine requesting information and records, and Occidental sent someone out to interview Koire. Taylor did not recall obtaining medical records of Dr. Stark's surgeries on Koire's hands and arms, and did not recall sending anyone to talk to Stark. Taylor did not seek any medical advice in processing Koire's claim.

Koire's physician, Dr. Seymour Levine, sent a July 8, 1983, letter to Occidental (Exh. 9), regarding Koire's disability claim. It stated that although Levine considered him totally disabled since October 23, 1977, Koire had twice returned to work and "resumed his full duties at

work despite my telling him not to work at all and then telling him to limit himself to supervisory work only."

Koire returned to operate his business in June 1982, with six or seven employees working for him. He worked six or seven days a week, and 10 to 12 hours a day, doing banking and financing, writing deli, candy, and sundry orders, supervising stocking of dated merchandise, training staff, checking store equipment, obtaining and selling discounted fire-damaged merchandise, billing, seeing special customers who placed large orders, and meeting with 30 to 35 liquor sales representatives, wholesalers, and management people per week. Koire ordered the liquor and set retail prices, but employees actually placed price tags on each bottle.

Before 1977, Koire rang the cash register, lifted boxes, and stocked shelves because he enjoyed such work and used it as a form of exercise. He was not required, however, to do this clerk's work. After he had problems with his hands and arms from 1977-1979, and after returning to work in 1982, his employees rang the cash register and stocked shelves, which Koire never considered part of his duties.

Zolkewitz, testifying as an expert witness, formed the opinion that Occidental did not make a determination of Koire's critical duties immediately before his accident. Occidental underwrote him initially in a managerial capacity, and in Zolkewitz's opinion Koire performed those duties during the six-month period in question. Zolkewitz testified that Occidental erroneously failed to determine Koire's critical job duties when his disability began. A manager's critical duties are supervisorial and

not necessarily ringing up cash registers or lifting merchandise. Zolkewitz would have evaluated the claim on the basis of managerial duties, not clerical functions. Unlike clerical functions, which a manager can employ others to perform, unique managerial duties cannot be performed by employees. Zolkewitz construed the policy language, "resume his occupation on a full-time basis," to refer to Koire's occupation as manager-owner of a liquor store.

Zolkewitz felt that Occidental did not give Koire's interests at least as much consideration as its own, misrepresented the facts in its July 12 letter to Koire, and that Occidental's actions in handling Koire's claim were unreasonable.

Koire testified that during the first telephone call he made to Occidental after his January 1982 claim, someone answered "Individual Health Benefits." Koire asked to speak to Mr. Gell. He overheard a conversation between Gell and the man who answered the phone, who said, "It's that deadbeat Koire on the telephone again." Koire spoke to Hays about being called a deadbeat; Hays made no comment. Hays talked by telephone with Koire, who told him a [sic] Occidental employee had called him a deadbeat. Hays said he would look into it, and everybody in Hays's department denied the allegation.

ISSUES

On appeal, Occidental claims that:

1. The jury heard prejudicially erroneous instructions on liability, requiring a new trial;

2. The jury was prejudicially misinstructed on punitive damages;

3. The punitive damages award lacks evidentiary support and is unconstitutional, and should be reversed with directions to enter judgment for Occidental; and

4. The award of attorneys fees was improper and should be reversed.

DISCUSSION

1. Jury Instructions on Liability

Occidental claims on appeal that it was forced to meet an unfair burden of proof when the jury was instructed to resolve all doubts as to meaning against Occidental and to construe the policy strictly against Occidental when any uncertainty exists.

A party may not complain on appeal that an instruction correct in law is too general or incomplete unless the party requested an additional or qualifying instruction. But Code of Civil Procedure section 647 as construed by case authority deems as excepted the giving, refusing to give, or modifying of an instruction requested. Thus failure to offer an alternative instruction does not bar the assertion of error in an instruction as delivered. The appellate court, however, must first determine whether an instruction contained an incorrect statement of law. Only then may a party complain of error. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949.)

Occidental complains about the following instructions and parts of instructions. As indicated by the citations to case law that follow each instruction, they are correct statements of law.

1. "The meaning of an insurance policy is to be ascertained according to the insured's reasonable expectation of coverage, and all doubts as to meaning are to be resolved against the insurer." (*Gyler v. Mission Ins. Co.* (1973) 10 Cal.3d 216, 220; *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.)

2. "If any ambiguity or uncertainty exists, an insurance policy is to be construed strictly against the insurance company, and most liberally in favor of the policyholder." (*Farmers Ins. Exchange v. Galvin* (1985) 170 Cal.App.3d 1018, 1021.)

"[A]ny uncertainties or ambiguities which may appear in the insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force and effect to the policy should be adopted. [¶] If semantically permissible, the terms of an insurance contract are to be given such construction as will achieve its object of securing indemnity to the insured for the losses to which the insurance relates." (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 881.)

"In determining what benefits or duties defendant owed to plaintiff pursuant to the policy of insurance, you may not look to the words of the policy alone, but must also consider the reasonable expectations of the public and plaintiff and the protection which he reasonably had

a right to expect." (*Horace Mann Ins. Co. v. Analisa N.* (1989) 214 Cal.App.3d 850, 854.)

"The burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language. [¶] An insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear." (*State Farm Mut. Auto Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202.)

Occidental argues that the court, not the jury, decides issues of policy interpretation, citing *Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59; Evidence Code section 310, subdivision (a); and *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 35.)

When the trial court heard the parties on the issue of jury instructions, Occidental made the same objections it now makes on appeal: that the question of ambiguity of policy language is for the court and not for the jury; that the policy language itself was not ambiguous; and that only after an ambiguity is determined to exist does the court reach the issue of the insured's reasonable expectation. Occidental concluded by arguing that there was no evidence as to plaintiff Koire's reasonable expectation that the policy provided multiple sickness benefits.

Occidental submitted its own set of instructions on ambiguity issues, stating that it was doing so "in an abundance of caution" and "simply defensively." The trial court ruled to use [sic] both sets of instructions, and to permit both parties to argue to the jury that they were considering a case where they may or may not find ambiguity.

The latter ruling was erroneous. The preliminary determination whether an ambiguity exists is a question of law. (*NN Investors Life Ins. Co. v. Superior Court* (1989) 208 Cal.App.3d 1070, 1072.) A policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 912.)

The interpretation of an insurance policy, like any other contract, is a matter of law as to which a reviewing court must make its own independent determination. (*State Farm Fire & Casualty Co. v. Lewis* (1987) 191 Cal.App.3d 960, 963.) The case at bench turned upon the policy definition of "recurrent disability." That definition, in part, stated that "[a] recurrence of total disability commencing after the Insured has resumed his occupation on a full time basis for a continuous period of six months shall be considered a new total disability."

Occidental interpreted this language as requiring the resumption of all occupational duties. Since when Koire returned to work he retained a degree of impairment in his hands such that he could not lift liquor cases, operate the cash register, stock shelves, or do other tasks requiring physical labor or manual dexterity, defendant argued that he had not resumed his occupation on a full time basis.

Plaintiff, by contrast, characterized such tasks requiring physical labor or manual dexterity as "clerk work." Undertaken by Koire for exercise and the pleasure in day-to-day involvement in the practicalities of his business, such clerk work could be delegated to employees and was a minor, inessential part of Koire's

actual occupation – owning and operating the business – which was managerial in nature.

Neither construction is unreasonable, rendering the policy language ambiguous under the legal definition. Thus this court must resolve the ambiguity, through its power to interpret the policy language de novo, according to familiar rules of construction. Doubts, uncertainties, and ambiguities arising from policy language should be resolved in favor of the insured in order to protect his reasonable expectation of coverage. (*Producers Dairy Delivery Co. v. Sentry Ins. Co., supra,* 41 Cal.3d at p. 912.) In analyzing a policy, the language must be read in its ordinary sense, with the meaning that a layman would ordinarily attach to it. (*NN Investors Life Ins. Co. v. Superior Court, supra,* 208 Cal.App.3d at p. 1072.)

To protect an insured's reasonable expectation of coverage, an insurance policy will be given such interpretation as is semantically permissible to achieve its object of providing indemnity for the loss to which the insurance relates. If the ambiguity relates to the extent of coverage, the language will be understood in its most inclusive sense for the insured's benefit and will be resolved against the insurer, to protect the insured's reasonable expectation of coverage in a situation in which the insurer drafts the policy and controls its language. (*Aerojet-General Corp. v. Superior Court* (1989) 209 Cal.App.3d 973, 982; *Hollingsworth v. Commercial Union Ins. Co.* (1989) 208 Cal.App.3d 800, 805.)

For these reasons the plaintiff's interpretation of the policy language was correct, and thus the trial court's

erroneous submission of this issue to the jury was harmless.

Whether an insured's expectation of coverage under a policy is reasonable is also a question of law. (*Aerojet-General Corp. v. Superior Court, supra,* 209 Cal.App.3d at p. 982.) To reiterate the relevant policy language, "a recurrence of total disability commencing after the Insured has resumed his occupation on a full time basis for a continuous period of six months shall be considered a new total disability."

Erreca v. West. States Life Ins. Co. (1942) 19 Cal.2d 388, 396, stated: "[T]he term 'total disability' does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business. [Citations.] Conversely, the insured is not totally disabled if he is physically and mentally capable of performing a substantial portion of the work connected with his employment. He is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business. [Citations.]"

This language necessarily implies that if someone resumes work and is physically capable of a substantial portion of the work connected with the employment, even if that person cannot or does not perform each and

every one of "incidental" duties, that person is not disabled. In the case at bench, although the plaintiff's hands and arms prevented him from doing dexterous or manual "clerk work," such work was incidental to plaintiff's substantial duties, which were managerial in nature. What amounts to total disability is a question of fact (*id.*, at p. 397); so is the question whether plaintiff Koire "resumed his occupation on a full time basis." It is reasonable as a matter of law for the plaintiff to have expected the recurrent disability provision to cover his loss of ability to perform his substantial duties, managerial in nature, resulting from his fall on December 29, 1982.

As this court has the power to determine issues of law as described in the above discussion, and as our determination of such issues does not indicate that the jury produced an incorrect verdict, we see no reason to reverse the judgment. (See, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co., supra,* 175 Cal.App.3d 1, 35; and *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 13.) None of the cases cited by defendant, nearly all of which are out-of-state, federal, and 19th-century California cases, persuades us otherwise.

2. The Instruction on Breach of the Covenant of Good Faith and Fair Dealing

Defendant objects on appeal to the following instruction, quoted in part:

"To establish that defendant has breached the covenant of good faith and fair dealing the plaintiff has the

burden of proving by a preponderance of the evidence any one of the following facts:

"1. Defendant unreasonably withheld payments due under the policy; or

"2. Defendant failed to investigate the possible bases that might support Koire's claim; or

"3. Defendant failed to properly investigate Koire's claim; or

"4. Defendant denied Koire's claim based on requirements it knew were impermissible; or

"5. Defendant unreasonably delayed its decision and actions in handling Koire's claim; or

"6. Defendant interpreted records for the purpose of defeating Koire's claim; or

"7. Defendant interpreted policy provisions for the purpose of defeating Koire's claim; or

"8. A prudent insurer would have paid Koire's claim. . . . "

Defendant characterizes its duty to act in good faith as "a duty not to withhold unreasonably payments due under a policy." (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573. Defendant argues that the instruction, phrased in the alternative, erroneously permitted the jury to have found that Occidental did not unreasonably withhold payments due under the policy, yet to hold Occidental liable in tort on one or more of seven other grounds.

The jury was also instructed that "[a]n insurance company which fails to deal fairly and in good faith with

its insured by refusing unreasonably to pay the insured for a valid claim covered by the policy is liable for all damages legally resulting from such conduct."

The jury's verdict answered "yes" to the following question: "Did the defendant breach the covenant of good faith and fair dealing when it refused to pay plaintiff, Leonard M. Koire, benefits under his disability insurance policy arising from his fall at his place of business on December 29, 1982?" This verdict specifically found that the defendant unreasonably withheld payments due under the policy, and negates Occidental's claim on appeal.

3. The Instruction on the Insurer's Obligation

Defendant on appeal objects to the following jury instruction: "As a supplier of public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust."

This instruction quotes *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820. Defendant argues that the instruction erroneously exceeds the standard to which an insurance company is held in matters of coverage. However, in context, this instruction defined the term, "fiduciary duty," that was used in the preceding instructions, "Fraud and Deceit – Nondisclosure of Known Facts," and "Fiduciary Duty."

" . . . When the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial. [Citation.]" (*Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208, 214-215.)

The insurer is duty bound to conduct itself with the utmost good faith for the insured's benefit, at least as to the insured's right to obtain contractual benefits. (*Shultz Steel Co. v. Hartford Accident & Indemnity Co.* (1986) 187 Cal.App.3d 513, 519.) " . . . An insured who has obtained liability coverage reasonably expects to be protected from losses covered by the policy and likewise expects the insurer to stand by its part of the bargain in affording such coverage. The elements of adhesion, one-sidedness, and the potential for unfair and oppressive conduct are evident when the insurer attempts to back out of the risks it has contracted to protect against or otherwise take advantage of the insured. . . . " (*Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 450.)

Given the limitation of the fiduciary duty to benefits within the insurance contract, as discussed in *Shultz* and *Gibson*, under the circumstances of the case at bench we do not find the instruction erroneous.

4. Misinstruction on Punitive Damages

Defendant on appeal challenges two instructions concerning fraud as grounds for awarding punitive damages. The first challenged instruction in part stated that

"[f]raud embraces multifarious means whereby one person gains an advantage over another and means, in effect, bad faith, dishonesty, or over-reaching." The second challenged instruction stated in part that "the plaintiff has the burden of establishing by a preponderance of the evidence that as a result of defendant's breach of the covenant of good faith and fair dealing that . . . [t]he nature and amount of punitive damages, if any, to be assessed against the defendant."

In every insurance contract, an implied covenant requires the insurer to do nothing to impair the insured's right to receive the benefit of the contractual bargain – that the insurer will promptly pay to the insured all sums due under the contract. A cause of action in tort arises when an insurer unreasonably refuses to pay benefits due, or when it fails to investigate its insured's claim properly. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1096.)

Such an action can support a punitive damages award as an action for breach of a noncontractual obligation" . . . where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. . . . " (Civ. Code, § 3294, subd. (a).)

To support an award of punitive damages, a plaintiff must show more than bad faith by the insurer; a plaintiff must show "oppression, fraud, or malice." (*Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 462.) Defendant argues that because the challenged instruction includes "bad faith" as one of several definitions of "fraud," the jury could have made "bad faith" the basis for a punitive damage award.

Defendant notes that during deliberations the jury sent a note asking the court: "Is there a difference between 'bad faith' as in the definition of fraud and 'breach of covenant in good faith and fair dealing'?" The court answered: "Please be more specific as to which instructions you are referring to in this question. Use paper clips." The jury did not answer the question before returning its verdict.

A poll later revealed that one juror out of 12 dissented on the finding in favor of the plaintiff, and on questions one and two. Two jurors out of 12 dissented on question seven. The jury voted unanimously on questions three and five. Responding to question one, the jury found that the defendant breached the covenant of good faith and fair dealing when it refused to pay the plaintiff benefits under his disability insurance policy arising from his December 29, 1982, fall. Questions seven asked: "Do you find that defendant was guilty of malice, oppression or fraud in its breach of the covenant of good faith and fair dealing?" It answered, "yes."

Prejudice from an erroneous instruction is never presumed. Instead, the appellant must affirmatively demonstrate prejudice and show that it resulted in a miscarriage of justice, which should be declared only when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 371; *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 770.)

The following factors are considered in measuring the effect of an erroneous instruction: " . . . (1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citation]." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876.)

The evidence of the defendant's failure to investigate plaintiff's claim according to industry standards and to determine the claim according to its own claims manual was substantial. An insurance industry expert testified that defendant's July 12, 1983, letter misrepresented the facts to Koire, that defendant's insurance policy definition of total disability did not comply with California law, and that its actions in handling the claim were unreasonable. Occidental never determined Koire's critical duties before his December 29, 1982, fall, and determined his 1983 claim on the basis of facts and information that related to an earlier, 1977, claim. Occidental did not check with other companies to confirm Koire's statement that other insurers were paying him benefits. Occidental did not contact anyone to determine the critical duties of a manager of a retail liquor business, and did not investigate Koire's duties with his employees. There was evidence that a Occidental employee referred to Koire in his hearing as a "deadbeat."

Plaintiff's argument to the jury referred expressly to the correct instruction: "I think that clearly shows the

malice, oppression or fraud." It did not equate bad faith and fraud, imply that the two were the same thing, or define fraud as bad faith. (The defense underscored the point by arguing that "One of the questions that you will have to answer when you retire to the jury room, unless you answer the first question in favor of the defendants, will be whether or not Occidental, in denying Mr. Koire's 1982 claim, acted with malice, fraud or oppression.")

The jury did not request a rereading of the erroneous or of related instructions. The jury's inquiry is ambiguous at best, which is why the trial court answered the way it did, inviting the jury to specify the instruction to which the question related.

As to the closeness of the jury's verdict, cases relying on this element as a factor in reversal for instructional error have involved jury verdicts of nine votes for the verdict, and three against.[1] In the case at bench, the jurors polled 11 votes yes and one vote no on question one, and 10 votes yes and two votes no on question seven.

As to the fifth factor, the jury was also instructed specifically as to "Punitive Damages – Recovery of and Measure." That instruction stated: "If you find plaintiff suffered damage as a legal result of the defendant's

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[1] *LeMons v. Regents of University of California, supra,* 21 Cal.3d 869, 874, 876; *Seaman's Direct Buying Service, Inc. v. Standard Oil, supra,* 36 Cal.3d 752, 774; *Bolen v. Woo* (1979) 96 Cal.App.3d 944, 955; *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 80, 88; *Brady v. Elixir Industries* (1987) 196 Cal.App.3d 1299, 1307. An 11 to 1 verdict weighs against finding prejudice from instructional error: see, e.g., *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1072.

breach of the covenant of good faith and fair dealing, you may then consider whether you should award punitive damages against defendant insurance company. . . . You may, in your discretion, award such damages if, but only if you find by clear and convincing evidence that the insurance company was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability." The instruction went on to define "fraud" as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

The instruction further defined "clear and convincing evidence" as "evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability that the facts of which it is proof are true. But the facts need not be proved so conclusively that every reasonable doubt is removed, which is the test for criminal cases."

The instruction emphasizes both the specific level of proof necessary for punitive damages – clear and convincing evidence – and uses the definition of "fraud" in Civil Code section 3294, subdivisions (a) and (c)(3). A single instruction, clause, or phrase is not to be read in a vacuum but instead must be construed with all other instructions delivered. Considered as a whole, when the instructions state the law fairly and clearly, they are unobjectionable even though by selecting isolated parts of a single instruction, they may be subject to criticism in some respect. (*Valdez v. J. D. Diffenbaugh Co.* (1975) 51 Cal.App.3d 494, 511.)

We consider the last factor conclusive, and find no merit in the defendant's claim on appeal.

5. Punitive Damages

Defendant claims on appeal that no substantial evidence supports the award of punitive damages. Occidental reiterates that there was neither malice, oppression, or fraud. For the reasons stated and the evidence recited in the preceding section, however, this claim must fail.

Occidental also claims on appeal that the punitive damages award is unconstitutional. Occidental argues that because the jury was instructed that the law provides no fixed standard as to the amount of punitive damages, the standard is unconstitutionally vague and a denial of due process. *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402, *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 66, and cases there cited, have rejected these arguments.

6. Attorneys [sic] Fees

Defendant claims on appeal that the award of attorney's fees was improper and should be reversed, arguing that no damages for attorney's fees should be permitted. Defendant asserts that *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 815, should be overruled. *Brandt* held that attorneys [sic] fees that are reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages.

Brandt has not been overruled. (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 890.) Stare decisis doctrine permits only the California Supreme Court, not a lower

one, to depart from the Supreme Court in an appropriate case. "[T]he [stare decisis] policy is a flexible one which permits *this* court to reconsider, and ultimately to depart from, *our own* prior precedent in an appropriate case . . . . " (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296; emphasis added.) This court therefore necessarily declines defendant's invitation to overrule *Brandt*.

Defendant also argues that even under *Brandt*, the plaintiff should not have been awarded attorneys [sic] fees because he failed to meet his burden of proving the amount of fees to which he was entitled.

Before trial, the parties agreed that the trial court would determine attorneys [sic] fees instead of the jury, a procedure approved by *Brandt v. Superior Court, supra*, 37 Cal.3d at pp. 819-820. On June 23, 1988, the trial court granted in part defendant's motion to tax costs, which involved item nine on plaintiff's memorandum of costs, attorneys [sic] fees in the amount of $54,000. The trial court partially taxed item nine in the sum of $28,000, yielding the sum of $26,000 and resulting in total costs of $30,265.54.

Brandt states, " ' . . . [W]hen the insurer's conduct is unreasonable, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which . . . includes those attorney's fees that were incurred to obtain the policy benefits and that would not have been incurred but for the insurer's tortious conduct.' [Citation.] The fees recoverable, however, may not exceed the amount attributable to the attorney's efforts to

obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable." (*Id.*, at p. 819.)

Brandt thus limits recovery of attorneys [sic] fees to fees related by the attorney's time devoted to recovering the payment originally sought arising from the policy. Defendant on appeal argues that plaintiff failed to provide evidence of this amount or of fees Koire's attorney actually incurred. Plaintiff's attorney, however, submitted a detailed declaration under penalty of perjury concerning attorney services. It recited his customary hourly fee for legal services, total hours expended, hours attempting to obtain policy benefits, the amount of policy benefits, and a total request for attorneys fees. The declaration accompanied a memorandum of costs.

Other than the minute order granting defendant's motion to tax attorneys [sic] fees in the memorandum of costs, the record on appeal contains no evidence that the defendant challenged the figures in the declaration of plaintiff's attorney. Thus the evidence as to the time the attorney spent obtaining Koire's policy benefits and as to the amount of those benefits was uncontradicted. As modified by the trial court, it is sufficient evidence to support the award of attorneys [sic] fees.

Defendant speculates on appeal that Koire did not actually pay his attorney the hourly rate reflected in the memorandum because his attorney handled the case on commission. The record on appeal does not indicate that the defendant placed any contradictory evidence before the trial court. The memorandum of costs shifted the

burden of proof to the defendant as to these matters. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.) Where a party challenging an award of attorneys [sic] fees does not make an adequate record in the trial court, we do not remand for a redetermination of fees. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

The record on appeal does not contain the basis of the motion to tax costs, which waives an objection as to the apportioning of attorneys [sic] fees as to contractual policy benefits as opposed to tortious recovery. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1409.) The payment arrangement between Koire and his attorney remains extrinsic to the trial court's award. (*Id.*, at pp. 1409-1410; *Wiener v. Van Winkle* (1969) 273 Cal.App.2d 774, 788-789.)

In light of the trial court's exercise of its discretion as evidenced in its partial granting of defendant's motion to tax costs, we find no abuse of discretion in the trial court's award of attorneys [sic] fees. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

DISPOSITION

We affirm the judgment of the trial court.

NOT TO BE PUBLISHED

HINZ, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

S 018681

IN THE

SUPREME COURT OF CALIFORNIA

LEONARD M. KOIRE,

Plaintiff and Respondent,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Defendant and Appellant.

After A Decision By The Court Of Appeal
Second Appellate District, Division Three
[Case No. B036342]

PETITION FOR REVIEW

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IN THE
SUPREME COURT OF CALIFORNIA

LEONARD M. KOIRE,

Plaintiff and Respondent,

vs.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Defendant and Appellant.

PETITION FOR REVIEW

ISSUES PRESENTED

Petitioner seeks review by this court on issues 1, 2, and 3. As to issues 4 and 5, petitioner requests this court to grant review and transfer the case back to the Court of Appeal for reconsideration.

1. Whether it was prejudicially erroneous to instruct the jury in an insurance bad faith case that "the obligations of insurers *go beyond meeting reasonable expectations of coverage*" and that an insurer's obligations "encompass qualities of decency and humanity *inherent in the responsibilities of a fiduciary.*" (Emphasis added.)

2. Whether *Brandt v. Superior Court* (1985) 37 Cal.3d 813, which held that "[w]hen an insurer tortiously withholds benefits, . . . attorney's fees, reasonably incurred to compel payment of the policy benefits, [are] recoverable

as an element of the damages resulting from such tortious conduct" (*id.*, at p. 815), should be overruled.

3. Whether the punitive damages in this case were awarded under a standard that is unconstitutionally vague under the state and federal due process clauses.

4. The Court of Appeal correctly held the following instructions were erroneous:

(a) instructing that fraud is grounds for awarding punitive damages and that "fraud . . . means . . . bad faith" was error because an insurer's bad faith alone is not sufficient to support punitive damages,

(b) instructing that "plaintiff has the burden of establishing *by a preponderance of the evidence* . . . [t]he nature and amount of punitive damages, if any, to be assessed against the defendant" (emphasis added) was error because the Legislature has required that a punitive damages award must be supported by "clear and convincing evidence," and

(c) instructing that doubts and uncertainties regarding an insurance policy are construed against the insurer was error because legal principles of policy interpretation are for the court, not the jury.

The Court of Appeal held these improper instructions to be harmless error by erroneously evaluating their prejudicial effect under a standard of review that "views factual matters most favorably to the *prevailing* party and resolves conflicts in the evidence in favor of the judgment." The issue is whether this court should grant review and transfer the matter back to the Court of Appeal with directions to reconsider in light of the

correct standard of review for erroneous jury instructions, i.e., that the appellate court "must assume that the jury might have believed the evidence favorable to the *losing* party" (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 573, emphasis added; accord, *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674).

5. Using the same erroneous standard of review, the Court of Appeal held improper instructions regarding liability were harmless because, *as a matter of law*, plaintiff's insurance claim should have been paid. Since determination of the issue of liability depended on the jury's resolution of an evidentiary conflict and neither party ever contended the issue could be decided as a matter of law, petitioner contends the Court of Appeal violated Government Code section 68081 and, accordingly, review should be granted and the matter transferred back to the Court of Appeal pursuant to section 68081 with directions to reconsider after giving the parties an opportunity to present briefing on the issue, never raised or briefed by any party, whether *as a matter of law* plaintiff's insurance claim should have been paid.

INTRODUCTION

In this insurance bad faith case, a jury awarded plaintiff $125,000 in compensatory and $750,000 in punitive damages and the court awarded $26,000 in attorney's fees. The verdict was fundamentally tainted by a number of seriously improper jury instructions. The Court of Appeal held several instructions were erroneous but harmless, held other challenged instructions were correct, and affirmed.

A. Issues Presented For Supreme Court Review.

1. One instruction held correct by the Court of Appeal is one given with increasing frequency in insurance bad faith cases. (Indeed, it is a form instruction in a leading treatise. (Shernoff, et al., Insurance Bad Faith Litigation (1990) § 23.52[2], p. 23-32.))

The instruction states an insurer's obligations "*go beyond* meeting reasonable expectations of coverage" and "encompass qualities of *decency and humanity inherent in the responsibilities of a fiduciary.*" (emphasis added.) It is wrong because *reasonable* expectations of coverage are all that have ever been required to be satisfied and *reasonableness* has always been the standard of an insurer's conduct. The instruction is prejudicial because the standard it tells the jury to apply is open-ended and limitless. It gives the jurors the opportunity, indeed it forces them, to conjure their own standard, providing directions only to pick a standard higher than the correct one.

This instruction also implicates a question on which the Courts of Appeal are in conflict: whether the relationship between an insurer and its insureds is a fiduciary one. The instruction imposes a strong fiduciary obligation.

Review should be granted and this court should disapprove this incorrect, powerfully prejudicial, and increasingly popular instruction.

2. Review should also be granted to reevaluate this court's opinion in *Brandt v. Superior Court* (1985) 37 Cal.3d 813, which held certain attorney's fees can be recovered as tort damages in insurance bad faith cases. *Brandt*

should be overruled because it creates an unintended exception to the legislatively-adopted "American Rule" that each party should bear his or her own attorney's fees (Code Civ. Proc., § 1021). *Brandt* has been rejected elsewhere (see *Tynes v. Bankers Life Co.* (1986) 224 Mont. 350, 369 [730 P.2d 1115, 1127]) and criticized in California (see *California FAIR Plan Assn. v. Politi* (1990) 220 Cal.App.3d 1612, 1620 (Woods (F.), J., concurring) [urging this court to overrule *Brandt*]).

3. Review is also necessary to decide whether the standards governing juries' awards of punitive damages in California violate the state and federal due process clauses. The federal constitutional issue is presently pending before the United States Supreme Court. (*Pacific Mutual Life Insurance Company v. Haslip*, cert. granted Apr. 2, 1990, ___ U.S. ___ [108 L.Ed.2d 782, 110 S.Ct. 1780] (Dock. No. 89-1279).) Regardless of that court's decision, however, this court's interpretation of the California constitution is needed.

* * *

III.

REVIEW IS NECESSARY TO DETERMINE WHETHER PUNITIVE DAMAGES AWARDS IN CALIFORNIA VIOLATE THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The jurors in this case were instructed according to BAJI No. 14.71, that "[t]he law provides no fixed standard as to the amount of . . . punitive damages" they could award. (A.A. p. 144.) This non-standard standard is unconstitutionally vague and a denial of due process

under both the federal constitution (14th Amendment) and the California constitution (Art. I, § 7).

In the past this court has rejected constitutional challenges to punitive damages. However, the discussions on the issue have been cursory. (See, e.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 402, fn. 2.) The time has come to reexamine the constitutional questions and to do so fully.

The constitutionality of punitive damages under the federal due process clause is presently pending before the United States Supreme Court in *Pacific Mutual Life Insurance Company v. Haslip*, cert. granted April 2, 1990, ___ U.S. ___ [108 L.Ed.2d 782, 110 S.Ct. 1780] (Dock. No. 89-1279). It would be appropriate to grant review and hold the matter until the Supreme Court issues its opinion in that case (likely within the next seven months), and then remand to the Court of Appeal for reconsideration in light of the *Haslip* opinion.

However, regardless of the scope of the *federal* due process clause's impact on punitive damages awards, this court should decide the issue of the constitutionality of punitive damages under the *California* constitution. This court has stated that the equal protection clauses of the same federal and state constitutional provisions in issue here "provide generally equivalent *but independent protections* in their respective jurisdictions" and has based its holding on state constitutional grounds *"regardless of whether there is or is not compulsion to the same end by the federal Constitution."* (*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588, emphasis added.) This court should protect this state's citizens from punitive awards

assessed under the vague and limitless standards now in force.

* * *

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Three, No. B036342
S018681

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
FILED JAN 16 1991
IN BANK

LEONARD M. KOIRE, Respondent

v.

OCCIDENTAL LIFE INSURANCE COMPANY
OF CALIFORNIA, Appellant

Appellant's petition for review DENIED.

Arabian, J. did not participate.

Panelli, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 3

Horvitz & Levy
David S. Ettinger
15760 Ventura Blvd.
18th Floor
Encino, CA 91436

RE: Koire, Leonard M.
vs.
Occidental Life Insurance Company of Cal
2 Civil B036342
Los Angeles No. C493474

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 10/30/90 is now final.

* * Affirmed in Full. * *

Respondent To Recover Costs.

FEB 25 1991
ROBERT N. WILSON, Clerk

By: M. Gavinski
Deputy Clerk

§ 3294. [When permitted] (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material

fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

§ 657. [Grounds for new trial: Requisites of order granting new trial.] The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive or inadequate damages;

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons

specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.